

Team Arrangements

Office of Small Business Programs

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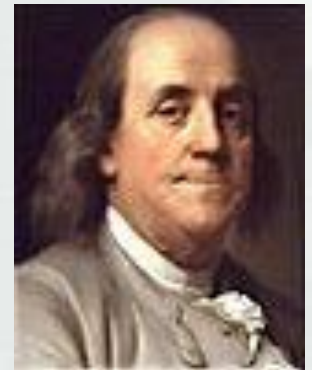


SBA

US Army Corps of Engineers
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***“An investment in knowledge
pays the best interest.”***



January 2010

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Dialogue

- Team Arrangements
- Affiliations
- Ostensible Subcontracting
- Limitations on Subcontracting



Procurement Center Representative

- Coordination of acquisition strategy
- Validate appropriateness of North American Industry Classification Code System (NAICS)
- Bundling, mitigation, breakout requirements
- Right of Appeal
- Education – Training - Awareness



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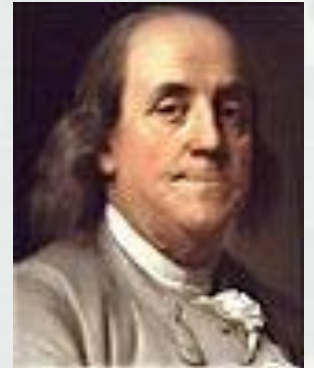
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“Genius without education is like silver in the mine.”

***“Courteous Reader:
Remember that time is money.”***



Team Arrangements

- Two or more companies form a partnership or joint venture to act as a potential prime contractor.
- A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified government contract or acquisition program.

Reference: FAR 9.601



Benefits of Teams

- Reduce the Administrative Burden
- Single Point of Contact
- Reduce Program and Contract Management
- Support Development of the Small Business Community
- Increase Competition and Expand Opportunities
- Increase Innovation

Reference: DOD Guidebook for Facilitating SB Team Arrangements



Partnership

- Two or more individuals or concerns who come together to co-own a trade or business for profit.
- No distinction between the business and the owners
- Partnership (members) shared profits and risks
- The partnership (members) in privity of contract with the government

Reference: DOD Guidebook for Facilitating SB Team Arrangements



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Joint-Venture

- An association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied,
- Consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period (“3-2 rule”),
- Combining efforts, property, money, skill, or knowledge,
- But not on a continuing or permanent basis for conducting business generally.

Reference: 13 CFR §121.103(h))



Joint-Venture

- Represents the formation of a new company
- May be a small business, Section 8(a), a HUBZone or SDV joint venture
- Must be listed in CCR
- Consists of small businesses only (Exception of SBA Mentor-Protégé for Section 8(a) Participants)
- Assist small businesses compete on larger contracts



Prime Contractor and Subcontractor

- An agreement to work together to pursue a prime contract with the promise to work together in good faith if successful.
- Prime is responsible; owns profits and risk.
- Prime in privity of contract with government.

Reference: CFR 13 CFR 121.103(h)



“Never confuse motion with action.”

***“Glass, china, and reputation,
are easily cracked, and never
well mended.”***



What is a Small Business?

- Must be organized “for profit.” Not-for-profit concerns are ineligible to be considered a small business.
- Together with affiliates meet the size standard for the North American Industry Classification Standard Code of the product or service it is providing.
- Foreign-owned concerns can be considered small businesses if they
 - ❑ have a place of business located in the US, or
 - ❑ operate primarily in the US, or
 - ❑ make a “significant contribution” to the US economy by paying US taxes or using American products or materials or labor.

Reference: 13 CFR §121.105



Size Includes Affiliates

- The size of a business is determined by counting its employees (or average annual receipts) **plus** those of **all** of its affiliates.
- Size is not separately determined for separate divisions, subsidiaries, locations, or product lines.
- Separate incorporation, payment of taxes, or “existence” is irrelevant.
- The key to determining the size of a business is affiliation and the key to it is **control**.



The Exception

- Where the acquisition is too large (i.e. bundled acquisition) for members of the Small Business Community to compete.
- Large Acquisitions:
 1. Revenue based size standard: the dollar value of the procurement, including options, exceeds half the size standard of the procurement.
 2. Employee based size standard: dollar value of the procurement, with options, is over \$10 million.

References: 13 CFR §121.103(h)(2)



What's the Deal?

- Revenues or employees are combined to determine size status
- A small business and its affiliates may be determined to be “Other than Small”
- You may be determined ineligible to response to small business set-asides.

References: 13 CFR 121.103 and 13 CFR 121.103(h)(2)



Affiliation Factors

- Others have power to control your business
- Common managers
- Identical business Interests
- Common stockholders
- Ownership of multiple businesses are owned
- Contractual relationships exist
- Joint venture arrangements exist ---

Others have the ability to control your business



Affiliation: A Matter of Control

- Concerns are affiliated with each other if:
 - ❑ one concern controls or has the power to control the other, or
 - ❑ if a third party has the power to control both.
- Determinations will consider factors such as:
 - ❑ stock ownership
 - ❑ stock options, convertible securities, agreements to merge
 - ❑ common management
 - ❑ substantially identical business/economic interests
 - ❑ previous relationships or ties (e.g., spin-offs)
 - ❑ economic dependency through contractual or other relations

Reference: 13 CFR §121.103



“All mankind is divided into three classes: those that are immovable, those that are movable, and those that move.”



For instance...

- If I own 100% of each of the following:
 - ❑ an ice cream parlor in Chicago and
 - ❑ a furniture manufacturing plant in Tibet and
 - ❑ a machine shop in Ohio and
 - ❑ a construction company in Montreal...
- Because I own and **control** all of them they are all affiliated and all of them must be added together to determine the size of any one of them.
- Location and line of business are absolutely, completely, totally irrelevant.

Relaxed Rule

- The “relaxed rule” means that so long as each JV partner *individually* qualifies as a small business, then the JV arrangement qualifies as small.
- In other words, a large business CANNOT be a member of a joint venture (exception is the Section 8(a) Mentor Protégé Participants).



Exception for the Section 8(a) Participant

- A Section 8(a) Participant that meets a procurement's size standard could enter into an SBA-approved mentor/protégé agreement with an Other Than Small mentor. The mentor and protégé can then form a JV—if approved by SBA—and then be eligible for award of a small business set-aside procurement or an 8(a) procurement.



Ostensible Subcontracting

“An ostensible subcontractor is a subcontractor that performs **primary and vital requirements** of a contract, or of an order under a multiple award schedule contract, or a sub-contractor upon which the prime contractor is **unusually reliant**. All aspects of the relationship between the prime and the subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of sub-contract-ed work), agreements between the prime and the subcon-tractor (such as bonding assistance or the teaming agree-ment), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.”

Reference: 13 CFR §121.103(h)(4)



Ostensible Subcontractor Rule

- A contractor and subcontractor will be treated **as if** they were joint venturers if the subcontractor will be performing the **primary and vital require-ments** of the contract **or** if the prime contractor is **unusually reliant** upon the subcontractor.
- In making that determination, SBA will consider a wide variety of factors including such things as contract management, technical responsibilities, and percentage of work subcontracted.



Ostensible Subcontractor

- A subcontractor that performs primary and vital requirements or a subcontractor upon which the prime contractor is unusually reliant.
- Applicable for small business set-asides.
- If an apparent low offer on a set-aside is what appears to be an ostensible subcontractor, referral is made to the Small Business Administration.

References: 13 CFR 121.103(h)(4) and FAR Part 19.302



Ostensible Subcontractor Factors Analysis

1. Who will manage the contract?
2. Which party possesses the requisite background and expertise to carryout contract?
3. Who “chased” the contract?
4. What degree of collaboration was there on the proposal?
5. Are there discrete tasks to be performed or is there a commingling of personnel and materials?
6. What is the relative amount of work to be performed by each?
7. Which party performs the most complex and costly contract functions

The seven factors analysis is useful, is not excusive, conclusion is based on finding of unusual reliance rises to the level of a joint venture upon examination of the entire record and a reasonable evaluation of the circumstances (Office of Hearing and Appeal – SBA)



Section 8(a) Joint-Venture

- If a Section 8(a) JV is formed, the Section 8(a) participant must perform a “significant” portion of the contract.
- If an Section 8(a) JV is formed, the 8(a) must receive at least 51% of the profits of the JV.
- Section 8(a) firms should consult their Business Opportunity Specialist at their local SBA office.

Reference: 13 CFR §124.520



Set-asides and Subcontracting

- You can subcontract only so much. All small business set-asides are subject to subcontracting limitations.
- The joint venture is subject to the limitations
- Not applicable in unrestricted competition
- Affiliation again: “ostensible subcontracting”

References: FAR Part 19.508(e) and FAR Part 19.811-3(e)
FAR Clause: 52.219-14 – Limitations on Subcontracting.



Small Business Set-Asides Summary

- This slide applies to Section 8(a), HUBZone, and SDV set-asides too.
- JV consists of small firms only.
- Affiliation exceptions for large procurements. Limitations on subcontracting, ostensible subcontractor scrutiny, and subcontracting limitations apply.



SBA Section 8(a) Participation

- SBA must have approved the Mentor-Protégé agreement
- SBA must have approved the Joint Venture agreement.
- Competes only for 8(a) procurements.
- At least one firm is 8(a) certified and less than one half the size standard corresponding to the NAICS code assigned to the contract.
- 8(a) firm must manage and furnish project manager and earn 51% of profits.
- See other special requirements in CFR requirements regarding 8(a) qualifications to joint venture.

References: 13 CFR 124.513)



HUBZone Set-Aside

- JV consists of HubZone concerns only.
- Limitations on subcontracting apply.
- 50% of the cost of personnel must be performed by Hubzone

References: 13 CFR 126.70

FAR Clause: 52.219-3: Notice of Total Hubzone Set-Aside



Service-Disabled Veteran Set-Aside

- SDVOB is managing partner.
- SDV receiving 51% of profits.

Reference: FAR Clause 52.219-27, Notice of Total Service Disabled Veteran-Owned Small Business Set-Aside



Limitations on Subcontracting

Services

Provide 50% of personnel costs

Supplies

Provide 50% of cost of manufacturing, excluding materials

General Construction

Perform 15% of cost of contract with own employees, excluding materials

Special Trade Construction

Perform 25% of cost of contract with own employees, excluding materials



Subcontracting Size Standards

- The NAICS code assigned to a prime contract may not be applicable to a particular subcontractor's work.
- Therefore, SBA regulations provide that a company is small for subcontracts "if it does not exceed the size standard for the NAICS code that the prime contractor believes best describes the product or service being acquired by the subcontract."

Reference: 13§121.410



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SBA's Mentor-Protégé Program

- Applicable to Section 8(a) Participants only
- May result in a JV with an “Other than Small” concern
- Section 8(a) may joint venture with its protégé to compete on any Federal procurement as a small business.
- Section 8(a) mentor protégé agreement must be reviewed annually by SBA

Reference: 13 CFR §121.103(h)(3)(iii)

Websites: www.sba.gov/8abd/indexmentorprogram.html
www.sba.gov/dc/dc_8amp.html



Joint Venture Agreements

- Use your attorney, understand, and monitor
- A Section 8(a) Participant must contact its Servicing SBA Office for Section 8(a) Mentor Protégé and Joint Venture Agreements
- Federal agency may wish to review your agreement
- Procurement Technical Assistance Center resource:
<http://www.dla.mil/db/procurem.htm>

